Kejuruteraan Bintai Kindenko Sdn Bhd v Serdang Baru Properties Sdn Bhd and another case

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24C(ARB)-9–04 OF 2016 AND WA-24C(ARB)-12–04 OF 2017
LEE SWEE SENG J
28 AUGUST 2017

Arbitration — Award — Variation — Award varied by arbitrator — Application by applicant to enforce award varied by arbitrator — Discretion of arbitrator to award pre-award interest — Whether entire award ought to be set aside — Arbitration Act 2005 ss 37, 39 & 42

The plaintiff, as contractor, was appointed by the defendant to design, construct and complete the development of a commercial centre. When the plaintiff did not complete the works by the completion date, the defendant terminated the plaintiff's employment and proceeded with arbitration for a total liquidated and ascertained damages ('LAD') claim of RM33,555. The plaintiff counterclaimed for: (a) the sum of RM25,525,624.87 being the value of works carried out by them together with a turnkey factor of 15%; and (b) a return of the advances made and monies paid to the defendant. The arbitrator allowed RM32,235 as LAD and further that found that there was no need for the defendant to prove its loss. The arbitrator also allowed the plaintiff's counterclaim. Subsequently, the plaintiff applied to the High Court to vary the award ('OS 2016') and the application was allowed. The award was varied and pursuant to this, the defendant appealed to the Court of Appeal. However, pending the hearing of the appeal by the Court of Appeal, the defendant applied to stay the order varying the award in OS 2016. The court heard the application by the plaintiff to enforce the award of the arbitrator as varied in OS 2016 ('OS 2017'). The varied award was allowed to be registered as a judgment of this court. This was a sequel to OS 2016. The issue that arose for determination, inter alia, was whether the party against whom an arbitral award was given may oppose recognition and enforcement of the award at the enforcement stage where the element of pre-award interest was concerned when it had not applied to set aside or vary the award where that element was concerned.

Held, allowing the application in part:

(1) The plaintiff in the arbitration did apply to vary the award under s 42 of the Arbitration Act 2005 ('the AA') but that was not on the point of the power of the arbitrator to award pre-award interest but rather on the award of LAD without the need to prove loss but by applying the agreed

formula for the LAD. Indeed it was not for the plaintiff to raise the issue of pre-award interest as it was a point in favour of the plaintiff. As the award was against the defendant in the arbitration, the defendant was well entitled to apply to set aside the award under s 37 or refer a question of law under s 42 at least with respect to pre-award interest but it did not do so. The matter of pre-award interest was not a matter that may be submitted for arbitration as s 33(6) of the AA. If the award contained a decision on pre-award interest, it was an award which contained a decision on a matter beyond the scope of the submission to arbitration under s 39(1)(a)(v) of the AA, although both parties had wanted the arbitrator to grant pre-award interest as in their respective claims and counterclaims (see para 19–20 & 36).

(2) There was no need to set aside the whole of the award as the saving provision in s 39(3) of the AA allowed the matter not submitted to arbitration to be excised from and separated from the matters submitted to arbitration. The part that was affected and infected with respect to the pre-award interest could be clearly and clinically severed or excised from the part of the award that was intact, which integrity had not been compromised or contaminated in any way by the pre-award interest element (see para 40).

[Bahasa Malaysia summary

Plaintif, sebagai kontraktor, telah dilantik oleh defendan untuk mereka bentuk, membina dan menyiapkan pembangunan pusat komersial. Apabila plaintif tidak menyelesaikan kerja-kerja pada tarikh siap, defendan telah menamatkan kerja plaintif dan meneruskan dengan timbang tara untuk tuntutan ganti rugi ('LAD') sebanyak RM33,555. Plaintif menuntut balas: (a) jumlah RM25,525,624.87 sebagai nilai kerja yang dijalankan oleh mereka bersama dengan faktor *turnkey* sebanyak 15%; dan (b) pemulangan pendahuluan yang dibuat dan wang yang dibayar kepada defendan. Penimbang tara membenarkan RM32,235 sebagai LAD dan selanjutnya mendapati bahawa tidak ada keperluan bagi defendan untuk membuktikan kerugiannya. Penimbang tara juga membenarkan tuntutan balas plaintif. Berikutan itu, plaintif memohon kepada Mahkamah Tinggi untuk mengubah award ('OS 2016') dan permohonan tersebut dibenarkan. Award tersebut diubah dan selaras dengan ini, defendan merayu kepada Mahkamah Rayuan. Walau bagaimanapun, sementara menunggu rayuan oleh Mahkamah Rayuan, defendan memohon supaya perintah penimbang tara seperti dalam OS 2016 diubah. Mahkamah mendengar permohonan oleh plaintif untuk menguatkuasakan award penimbang tara yang diubah dalam OS 2016 ('OS 2017'). Award yang diubah itu dibenarkan untuk didaftarkan sebagai penghakiman mahkamah ini. Ini adalah sambungan kepada OS 2016. Isu yang timbul untuk penentuan, antara lain, adalah sama ada pihak yang membuat award timbang tara yang diberi boleh membantah pengiktirafan dan

penguatkuasaan award di peringkat penguatkuasaan di mana unsur faedah pra-award adalah berkenaan apabila ia tidak memohon untuk mengetepikan atau mengubah award di mana elemen adalah berkenaan.

Diputuskan, membenarkan sebahagian permohonan:

(1) Plaintif dalam timbang tara memohon untuk mengubah award di bawah s 42 Akta Timbang Tara 2005 ('AA') tetapi bukanlah terletak pada kuasa penimbang tara untuk memberi faedah pra-award tetapi sebaliknya anugerah LAD tanpa perlu membuktikan kerugian tetapi dengan menggunakan formula yang dipersetujui untuk LAD. Sememangnya bukan untuk plaintif untuk membangkitkan isu faedah pra-award kerana ini adalah satu hujah yang memihak kepada plaintif. Oleh kerana award bertentangan dengan defendan dalam timbang tara, defendan berhak memohon untuk mengetepikan award di bawah s 37 atau merujuk soalan undang-undang di bawah s 42 sekurang-kurangnya berkenaan dengan faedah pra-award tetapi ia tidak berbuat demikian. Perkara faedah pra-award bukan perkara yang boleh dikemukakan untuk timbang tara seperti s 33(6) AA. Sekiranya award mengandungi keputusan mengenai faedah pra-award, ia adalah satu award yang mengandungi keputusan tentang sesuatu perkara di luar skop hujahan kepada timbang tara bawah s 39(1)(a)(v) AA, walaupun kedua-dua pihak menginginkan agar penimbang tara memberi faedah pra-award seperti dalam tuntutan dan tuntutan balas masing-masing (lihat perenggan 19–20 & 36).

(2) Tiada keperluan untuk mengetepikan keseluruhan award kerana sebagai peruntukan kecualian dalam s 39(3) AA yang membenarkan perkara yang tidak dihujahkan kepada timbang tara untuk dikeluarkan dan dipisahkan dari perkara yang dikemukakan kepada timbang tara. Bahagian yang terjejas berkenaan dengan faedah pra-pemberian boleh dengan jelas dan secara klinikal dipotong atau dikeluarkan dari bahagian anugerah yang utuh, yang integritinya tidak terjejas atau tercemar dalam apa-apa jua cara oleh elemen faedah pra-award (lihat perenggan 40).]

Notes

For cases on award in general, see 1(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1871–2112.

Cases referred to

Far East Holdings Bhd & Anor v Majlis Ugama Islam Dan Adat Resam Melayu Pahang and another appeal [2015] 4 MLJ 766, CA (refd)

Hadley v Baxendale [1854] 9 Exch 341 (refd)

Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd [2009] 4 MLJ 445, FC (refd)

Kejuruteraan Bintai Kindenko Sdn Bhd v Serdang Baru Properties Sdn

Bhd [2017] MLJU 528, HC (refd)
Kerajaan Malaysia (Kementerian Sumber Asli Dan Alam Sekitar) v Kumpulan Sakata Sdn Bhd [2016] MLJU 1856; [2016] 7 CLJ 412, HC (refd)
Kerajaan Malaysia v Tasja Sdn Bhd [2016] MLJU 371, HC (refd)
PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal [2014] 1 SLR 372; [2013] SGCA 57, CA (refd)
Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy [1995] 1 MLJ 817, FC (refd)
State Government of Sarawak v Chin Hwa Engineering Development Co [1995] 3 MLJ 237, SC (refd)

Legislation referred to

Arbitration Act 1950 [UK] s 26
Arbitration Act 1952 (repealed by Arbitration Act 2005) s 27
Arbitration Act 2005 ss 33(6), 37, 37(1), (4), 38, 39, 39(1), (1)(a)(v), (3), 42, 42(d)
Civil Law Act 1956 ss 11, 75
Contracts Act 1950 s 75
International Arbitration Award [SG] ss 3, 19
Rules of Court 2012 O 69

Sanjay Mohan (Adam Lee with him) (Mohanadass Partnership) for the plaintiff.
Felix Dorairaj (Dorairaj, Low & Teh) for the defendant.

Lee Swee Seng J:

[1] This is a sequel to encl 1 of Originating Summons No WA-24C(ARB)-9–04 of 2016 ('OS 2016') which was an application by the plaintiff here who was the respondent in an arbitration for the arbitral award to be varied under s 42 of the Arbitration Act 2005 ('the AA 2005').

PROJECT

[2] The plaintiff as contractor had been appointed by the defendant as employer via a letter of acceptance dated 5 February 2000 to design, construct and complete the development of a 19 storey retail commercial centre with residential apartments. The formal contract governing the parties was based on the JKR Conditions of Contract for Design and Build and Turnkey Projects 1999 edition subject to certain modifications.

[3] The defendant had terminated the plaintiff by a letter of termination dated 2 June 2008 for, inter alia, a failure to proceed regularly and diligently with the works.

PROCEEDINGS IN ARBITRATION

[4] The defendant had then proceeded with arbitration for a total LAD claim of RM33,555. The calculation was based on an agreed LAD of RM15,000 per day for sectional works and RM40,000 for the main building works for the relevant period of delay. The learned arbitrator allowed only RM32,235 as LAD, having found that the plaintiff was entitled to some extension of time. The learned arbitrator found that the defendant as claimant/employer in the arbitration was so entitled and there was no need to prove its loss. However the learned arbitrator had also assessed the actual damage suffered by the defendant as claimant/employer to be RM6,233,659.55 perhaps in anticipation of the High Court disagreeing with him because of the principle of law propounded by the Federal Court in *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817.

[5] *Selva Kumar* was reaffirmed by a later Federal Court case of *Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd* [2009] 4 MLJ 445. The Federal Court was of the view that pursuant to s 75 of the Contracts Act 1950, a party claiming liquidated damages is legally obliged to prove its damages in accordance with the principles set out in *Hadley v Baxendale* (1854) 9 Exch 341. As such, the Federal Court has decided that the defendant could not simply rely on the amount stipulated as liquidated damages as damages but instead has to prove its damages.

[6] The plaintiff as respondent in the arbitration counterclaimed for inter alia the sum of RM25,525,624.87 being the value of works carried out by them as of 29 May 2007 together with a turnkey factor of 15%. The plaintiff also claimed for a return of the advances made and monies paid to the defendant.

[7] The learned arbitrator allowed the plaintiff's counterclaim and so the nett sum payable by the defendant as claimant/employer to the plaintiff as respondent/contractor in the arbitration was RM1,718,943.99.

[8] The learned arbitrator also awarded simple interest at 5%pa from 3 June 2008 (a day after termination date) up to 9 March 2016 (date of award) and thereafter at 5% simple interest per annum until realisation.

PREVIOUS PROCEEDINGS IN THIS COURT

[9] The questions of law that the plaintiff had referred to this court pursuant to an application filed under s 42 of the AA 2005 are set out in Annexure A to OS 2016. Only the second and third questions of law were relevant and they are set out as follows:

Second Question of Law:

Given that the arbitrator has assessed the damages suffered by the defendant to be RM6,233,659.55, can he as a matter of law award the defendant a higher sum?

Third Question of Law:

a. whether there must be an express provision to state that parties are contracting out of s 75 of the Contracts Act 1950 in the light of clause 56 of the conditions of contract.

b. whether as a matter of law given that s 75 of the Contracts Act 1950 deals with the award of damages parties can agree to contract out of the Contracts Act 1950.

c. Whether upon a reading of clause 5.8 and/or Clause 5.10 of the main contract, parties had in fact contracted out s 75 of the Contracts Act 1950.

[10] After hearing arguments of the parties this court had varied the award as follows as reported in *Kejuruteraan Bintai Kindenko Sdn Bhd v Serdang Baru Properties Sdn Bhd* [2017] MLJU 528:

[95] The court, in a reference on questions of law, may under s 42(b) vary the award or under s 42(d) set aside the award, in whole or in part.

[96] For the reasons given above, I had therefore varied the award as follows:

That paragraph 954 of the award dated 9.3.2016 and paragraph 5 of the corrective award dated 4.5.2016 be set aside and the entitlement for payment as set out therein be set aside and it was further ordered that the Claimant/defendant shall pay the respondent/plaintiff the sum of RM28,220.284.44 as set out in the table above instead of the sum awarded of RM1,718,943.99.

[97] That paras 966, 967 and 968 of the award dated 9 March 2016 and paragraph 6 of the corrective award dated 4 May 2016 be set aside and it was ordered as follows:

a) that the claimant/defendant shall pay the respondent/plaintiff simple interest at the rate of 5% pa on the sum of RM28,220,284.44 from 3 June 2008 up to 9 March 2016.

b) that the claimant/defendant shall pay the respondent/plaintiff simple interest at the rate of 5% pa on the sum of RM28,220,284.44 from the date of the award until the actual realisation of the said payment by the claimant/defendant.

[98] I had also ordered the defendant to pay the plaintiff costs of RM20,000 for this application.

[11] Against that order of this court made on 8 December 2016 the defendant had on 5 January 2017 appealed to the Court of Appeal. Pending the hearing of the appeal by the Court of Appeal the defendant has applied by encl 23 in OS 2016 to stay the order varying the award of the learned arbitrator.

PRAYER

[12] However by consent of the parties this court had proceeded to hear OS No WA-24C(ARB)-12–04 of 2017('OS 2017') which is the application of the plaintiff under s 38 of the AA 2005 and under O 69 of the Rules of Court 2012 to enforce the award of the learned arbitrator as varied by this court by its order of 8 December 2016.

[13] After hearing parties and the objection raised by the defendant on the fact that based on the Court of Appeal's case of *Far East Holdings Bhd & Anor v Majlis Ugama Islam Dan Adat Resam Melayu Pahang and another appeal* [2015] 4 MLJ 766, the learned arbitrator has no power under the AA 2005 to grant pre-award interest, this court allowed the varied award to be registered as a judgment of this court less the interest of 5%pa from 3 June 2008 (date of termination) up to 9 March 2016 (date of the award).

[14] Against that decision the plaintiff has filed an appeal to the Court of Appeal for the pre-award interest amounted to about RM11m.

[15] The parties were able to agree on the terms of a conditional stay of the order with respect to encl 23 of OS 2016 and as the varied arbitration award has now become a judgment of the court less the pre-award interest, parties had recorded the terms of the consent order for a conditional stay of the judgment of this court dated 8 December 2016 as follows:

> By consent there shall be conditional stay of the enforcement of the judgment allowed in OS No WA-24C(ARB)-12–04 of 2017 conditional upon the following:
>
> 1. Kejuruteraan Bintai Kindenko Sdn Bhd shall be at liberty to lodge a prohibitory order and private caveat against the said land referred to in the affidavit of Serdang Baru Properties Sdn Bhd except that Kejuruteraan Bintai Kindenko Sdn Bhd shall not proceed further with a writ of seizure and sale by way of a public auction of the said land until the disposal of the appeal filed herein by Serdang Baru Properties Sdn Bhd;
> 2. Serdang Baru Properties Sdn Bhd shall file an affidavit within 7 days hereof disclosing that there are no creditors to the combined sum of RM1 million or more;
> 3. Liberty to apply; and
> 4. No order as to costs.

[16] With the recording of the above consent order, learned counsel for the defendant withdrew OS 24C(ARB)-16–05 of 2017 and so that OS opposing the enforcement of the arbitral award was withdrawn and so struck out with no order as to costs.

A PRINCIPLES

Whether the party against whom an arbitral award is given may oppose recognition and enforcement of the award at the enforcement stage where the element of pre-award interest is concerned when it had not applied to set aside or vary the B *award where that element is concerned*

[17] The grounds for refusing recognition or enforcement of an award under s 39(1) of the AA 2005 follow closely the grounds for setting aside an award under s 37(1) of the AA 2005. Section 39(1) of the AA 2005 reads as follows:

C 39 Grounds for refusing recognition or enforcement

(1) Recognition or enforcement of an award, irrespective of the state in which it was made, may be refused only at the request of the party against whom it is invoked —

(a) where that party provides to the High Court proof that —

D (i) a party to the arbitration agreement was under any incapacity;

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of the State where the award was made;

E (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case;

(iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;

F (v) *subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration*;

(vi) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which G the parties cannot derogate, or, failing such agreement, was not in accordance with this Act; or

(vii) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the H law of which, that award was made; or

(b) if the High Court finds that —

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or

I (ii) the award is in conflict with the public policy of Malaysia. (Emphasis added).

[18] There is no good reason why a party that has not applied to set aside an award under s 37 of the AA 2005 or refer a question of law under s 42 may not

at the stage of enforcement of the award raise the grounds listed under s 39(1) to oppose enforcement of the award.

[19] As the award was against the defendant as claimant in the arbitration, the claimant was well entitled to apply to set aside the award under s 37 of the AA 2005 or refer a question of law under s 42 at least with respect to pre-award interest but it did not do so.

[20] The plaintiff as respondent in the arbitration did apply to vary the award under s 42 of the AA 2005 but that was not on the point of the power of the arbitrator to award pre-award interest but rather on the award of LAD without the need to prove loss but by applying the agreed formula for the LAD. Indeed it is not for the plaintiff to raise the issue of pre-award interest as it is a point in favour of the plaintiff whether on the smaller sum as awarded by the learned arbitrator or the much bigger sum as varied by this court.

[21] The question then is whether the defendant as claimant in the arbitration may raise this now in opposing the recognition and enforcement of the award.

[22] The fact that Parliament had allowed the same grounds under a setting aside of an award under s 37 of the AA 2005 to be repeated in an application to oppose recognition and enforcement under s 39(1) would mean that Parliament does not consider the same grounds to be redundant.

[23] Granted, in a domestic arbitration, both an application for setting aside under s 37 of the AA 2005 and also a corresponding application under s 38 of the AA 2005 to recognise and enforce the award, generally the court would hear both applications together as one would be a flip side of the other in that if the award is set aside than correspondingly it will not be enforced and conversely if not set aside it would generally be enforced.

[24] However, in the case of an international arbitration, the setting aside is at the court where the seat of arbitration is. In the case of an international arbitration the seat of arbitration may well be different from the jurisdiction where a party may want to enforce an award in its favor. An award for instance may be against the public policy of the state where the award is sought to be enforced though the same award is not successfully set aside by the court where the seat of arbitration is.

[25] Likewise whilst an application for setting aside may not be made after the expiry of 90 days from the date on which the party making the application had received the award as provided under s 37(4) of the AA 2005 there is no such time frame for the enforcement of an award by way of registering it as a

judgment of the court under s 38 of the AA 2005. This is understandable and the enforcement would normally be applied for in the State where the award debtor has assets to be attached.

[26] As both s 37 and s 38 of the AA 2005 are applicable to domestic as well as international arbitration it is difficult to say that a ground that could be raised in a setting aside of an award if not raised, cannot be so raised for the first time in opposing an application for recognition and enforcement of the award.

[27] Our Supreme Court in *State Government of Sarawak v Chin Hwa Engineering Development Co* [1995] 3 MLJ 237 had recognised passive remedy even under the old Arbitration Act 1952. His Lordship Edgar Joseph Jr FCJ observed at p 244 as follows:

> We agree, that in certain circumstances, a party may avail himself of a passive remedy by which is meant he does not take the initiative to attack an award, but simply waits until his opponent seeks to enforce the award by action or summary process, when he resists enforcement. Mustill and Boyd on *Commercial Arbitration* (2nd Ed) at p 546 have instanced two situations when the passive remedy would be available; namely: (1) where the award is so defective in form or substance that it is incapable of enforcement; (2) where the whole or part of the award is ineffective, on the ground that the relief granted lies outside the jurisdiction of the arbitrator.

[28] The Singapore Court of Appeal wrestled with this issue of 'passive remedy' in *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372; [2013] SGCA 57. 'Active remedy' is understood to mean an award debtor applying to set aside an award and 'passive remedy' as in a award debtor resisting or opposing an application by an award creditor to recognise and enforce the award. It was explained thus in the award by Sundaresh Menon CJ as follows:

> 38 Thus, under the 1950 EAA, an award debtor had two options to avoid the consequences of an award: (a) the active remedy of setting aside under s 23; or (b) the passive remedy of resisting enforcement under s 26. This is buttressed by Sir Michael Mustill and Stewart Boyd, *The Law and Practice of Commercial Arbitration in England* (Butterworths, 1982) (*'Mustill & Boyd'*), where the authors recognised that there are two categories of remedies available after an award has been released. They termed these two categories as 'passive remedies' and 'active remedies' and described their operation in the following terms (at p 489):
>
> > A party avails himself of a passive remedy when he does not himself take any initiative to attack the award, but simply waits until his opponent seeks to enforce the award by action or summary process, and then relies upon his matter of complaint as a ground why the Court should refuse enforcement. (Emphasis added in italics and bold italics).
>
> 39 The authors' commentary (at p 488) on the options available to parties with

jurisdictional objections is remarkably on point:

> Jurisdictional problems
>
> If concerned with the existence or continued validity of the arbitration agreement, the validity of the notice to arbitrate or the qualifications of the arbitrator, (a party may) issue an originating summons or a declaration. Alternatively, (that party may) wait until after the award (has been published) and *then set aside the award or raise the objection as a ground for resisting enforcement*. (Emphasis added in italics and bold italics).

40 If the system of 'choice of remedies' is to be interpreted as one which permits parties to defend against an award passively by seeking to resist its recognition and enforcement in the enforcing court even though no active attack had been taken against the award, which is exactly how both Mr Landau and Mr Joseph understood it and how we saw it, it is evident that the features of this system were already part of English arbitration law by the 1970s at the latest.

[29] In Singapore international arbitration is governed by the International Arbitration Act (Cap 143A, 2002 Rev Ed) ('the IAA') wherein s 3 of the IAA provides as follows:

> 3(1) Subject to this Act, the Model Law, with the exception of Chapter VIII thereof, shall have the force of law in Singapore.

[30] The 'Model Law' referred to is the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law ('the Model Law'). Chapter VIII of the Model Law is where the various grounds for refusing recognition or enforcement of the arbitral award are set out in article 36 thereof which is reproduced in our s 39 of the AA 2005.

[31] Their s 19 of the IAA on the enforcement of awards merely states that leave of the High Court is required for its enforcement as a judgment of the court. It is the same as our s 27 of the Arbitration Act 1952 and s 26 of the English Arbitration Act 1950. It reads:

> 19 Enforcement of awards
>
> An award on an arbitration agreement may, by leave of the High Court or a Judge thereof, be enforced in the same manner as a judgment or an order to the same effect and, where leave is so given, judgment may be entered in terms of the award.

[32] The Singapore Court of Appeal had to delve and dig deeply into the legislative history of the IAA and the rationale for excluding the application of Chapter VIII of the Model Law in coming to the conclusion that the courts there would still refer to the grounds for resisting an enforcement of an award

as set out in article 36 of the Model Law in deciding whether or not leave to enforce the award as a judgment of the court ought to be given. The Chief Justice of Singapore Sundaresh Menon CJ concluded as follows:

> 84 As we have held, the content of the power to refuse enforcement under s 19 must be construed in accordance with the purpose of the IAA which, as we have stated, is to embrace the Model Law. Given that de-emphasising the seat of arbitration by maintaining the award debtor's 'choice of remedies' and alignment with the grounds under the New York Convention are the pervading themes under the enforcement regime of the Model Law, the most efficacious method of giving full effect to the Model Law philosophy would, in our view, be to recognise that the same grounds for resisting enforcement under art 36(1) are equally available to a party resisting enforcement under s 19 of the IAA.

[33] Quite obviously we do not have this problem as the whole of article 36 of the Model Law is reproduced in our s 39 of the AA 2005. The reproduction in s 39 following the same grounds in a setting aside of an award under s 37 cannot be for decorative purposes but for the deliberate design of permitting the same grounds not raised because there was no previous application to set aside under s 37 to be raised in resisting or opposing an application under s 39. The repetition of the same grounds has nothing to do with it being redundant but everything to do with reiteration as in making those same grounds available in resisting an enforcement application under s 39.

[34] One can appreciate that if a ground has been argued in a setting aside application under s 37 of the AA 2005 and the same ground is sought to be argued under a subsequent s 38 application in opposing an enforcement of an award, then res judicata might well apply to prevent the same ground from being ventilated again.

[35] In this case the matter of pre-award interest is not a matter that may be submitted for arbitration as s 33(6) of the AA 2005 as interpreted by the Court of Appeal in *Far East Holdings Bhd & Anor v Majlis Ugama Islam Dan Adat Resam Melayu Pahang and another appeal* [2015] 4 MLJ 766 simply does not allow an arbitrator to make an award covering pre-award interest.

[36] Thus if the award contains a decision on pre-award interest it is an award which contains a decision on a matter beyond the scope of the submission to arbitration under s 39(1)(a)(v) of the AA 2005. That is so even though both parties had wanted the arbitrator to grant pre-award interest as in their respective claims and counterclaims.

Whether the effect of Far East Holdings as decided by the Court of Appeal is such that this court shall give effect to it and separate the pre-award interest from the enforcement of the award

[37] The Court of Appeal in *Far East Holdings Bhd & Anor v Majlis Ugama Islam Dan Adat Resam Melayu Pahang and another appeal* [2015] 4 MLJ 766 Court of Appeal held that notwithstanding that interest was not pleaded, the arbitrator granted the pre-award interest based on the common law rights and under s 11 of the Civil Law Act 1956. The Court of Appeal held that the arbitrator has erred in law in granting the interest:

> [98] On the issue of interests, we agree with the learned judge that the arbitrator has erred in law in awarding pre and post-award interests. Having considered the Act, we find that under s 33(6), the Act has made specific provision for post award interest, but does not provide for pre-award interest. *Clearly, the Act does not contemplate the awarding of pre-award interest.* We agree with the submissions by learned counsel for FEH and KAOP that when the Act specifically provides for post award interest but is silent on pre-award interest, then implicitly *the legislature did not intend to confer on an arbitrator the power to award pre-award interest. Therefore, we agree with the learned judge that the award of pre-award interest ought to be set aside.* (Emphasis added).

[38] Section 33(6) of the AA 2005provides that:

> Unless otherwise provided in the arbitration agreement, the arbitral tribunal may —
>
> (a) award interest on any sum of money ordered to be paid by the award from the date of the award to the date of realization; and
>
> (b) determine the rate of interest.

[39] The above said decision was followed in the High Court cases of *Kerajaan Malaysia v Tasja Sdn Bhd* [2016] MLJU 371 and *Kerajaan Malaysia (Kementerian Sumber Asli dan Alam Sekitar) v Kumpulan Sakata Sdn Bhd* [2016] MLJU 1856; [2016] 7 CLJ 412. I had stated for the reasons set out the two cases just referred to, my personal preference for the awarding of pre-award interest, but respecting the doctrine of *stare decisis* or binding precedent, any High Court would be bound by a decision on the same issue given by a Court of Appeal that is the ratio of the case and not a mere obiter. In *Kerajaan Malaysia (Kementerian Sumber Asli dan Alam Sekitar)* it was observed as follows:

> [27] However for the time being, the position of the law on pre-award interest is as declared by the Court of Appeal in the *Far East Holdings* case. Irrespective of my personal predilection and preference, the position of the law on pre-award interest as may be awarded by an arbitrator is as propounded authoritatively by the Court of Appeal in the *Far East Holdings* case. To put it pointedly and plainly, an arbitrator has no jurisdiction to award pre-award interest but only post-award interest if provided for in the arbitration agreement.
>
> [28] The law will have the opportunity to develop as the cases from which the principle is derived, go through to the apex court. In the meanwhile, the doctrine of stare decisis or binding precedent, applies to the High Court.

[29] Both judicial deference and discipline would demand of a High Court to follow the decision of a Court of Appeal on a point of law already decided. Whilst one may be at liberty to state the persuasive arguments to the contrary, one is not at liberty to disregard an authoritative pronouncement of the law of a court higher up in hierarchy. The following reminder of the Federal Court in *Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd* [2006] 4 MLJ 113; [2006] 3 CLJ 177 would resonate with all who respect the rules of binding precedent:

> [45] ... In order to appreciate the importance of adhering to the doctrine of stare decisis useful references may be made to *Cassell & Co Ltd v Broome and another* [1972] AC 1027; [1972] 1 All ER 801 where Lord Hailsham said at p 809:
>
> > The fact is, and I hope it will never be necessary to say so again, that, in the hierarchical system of courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers. Where decisions manifestly conflict, the decision in *Young v Bristol Aeroplane* [1944] KB 718; [1944] 2 All ER 293 offers guidance to each tier in matters affecting its own decisions. It does not entitle it to question considered decisions in the upper tiers with the same freedom. Even this House, since it has taken freedom to review its own decisions, will do so cautiously. That this is so is apparent from the terms of the declaration of 1966 itself where Lord Gardiner LC said:
> >
> > Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.
>
> [30] Ever so often, an admonishment along the lines spelt out in *Periasamy s/o Sinnappan & Anor v Public Prosecutor* [1996] 2 MLJ 557 at pp 213–214; [1996] 3 CLJ 187 at p 582 has been repeated to rein in respect for the authority of a higher court:
>
> > Lastly, the learned appellate judge did not sufficiently address his mind to the decision in *Khoo Hi Chiang*. We find the cavalier fashion in which he approached the judgment of a five-member bench of the Supreme Court in a case which was an authority binding upon him to be quite appalling. We are convinced that the learned appellate judge ought not to have brushed it aside as he did.
> >
> > We may add that it does not augur well for judicial discipline when a High Court Judge treats the decision of the Supreme Court with little or no respect in disobedience to the well-entrenched doctrine of stare decisis. We trust that the occasion will never arise again when we have to remind High Court judges that they are bound by all judgments of this court and of the Federal Court and *they must, despite any misgivings a judge may entertain as to the correctness of a particular judgment of either court, apply the law as stated therein*. (Emphasis added.)

[40] However there is no need to set aside the whole of the award as the

saving provision in s 39(3) of the AA 2005 allows the matter not submitted as in could not be submitted to arbitration to be excised from and separated from the matters submitted to arbitration.

[41] Section 39(3) of the AA 2005 further provides as follows:

> 39(3) Where the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced.

[42] The part that is affected and infected with respect to the pre-award interest can be clearly and clinically severed or excised from the part of the award that is intact, which integrity has not been compromised or contaminated in any way by the pre-award interest element.

[43] The consequence is that the part containing the pre-award interest at the rate of 5%pa on the arbitral sum of RM28,220,284.44 from 3 June 2008 up to 9 March 2016 be removed from the recognition and the enforcement of the award.

PRONOUNCEMENT

[44] The part of the award enforced as a judgment of the court is the arbitral sum of RM28,220,284.44 and interest at the rate of 5%pa from 9 March 2016 (date of the award) to the date of realisation.

[45] I had therefore allowed judgment to entered accordingly for the above part of the award together with agreed costs of RM5,000 to be paid by the defendant to the plaintiff.

Allowed part of the application.

Reported by Afiq Mohamad Noor